

**STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,**

**Supreme Court Case No.: 154494  
Court of Appeals No.: 325883  
Lower Court No 12-003474-FH**

**v.**

**GARY MICHAEL TRAVER,  
Defendant-Appellee,**

\_\_\_\_\_ /

**DEFENDANT-APPELLEE'S  
SUPPLEMENTAL BRIEF ON APPEAL**

**\* \* \***

**CERTIFICATE OF SERVICE**

**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

INDEX OF AUTHORITIES CITED .....	3
INTRODUCTION .....	6
ISSUES .....	7
DID THE TRIAL COURT ERR BY PROVIDING WRITTEN INSTRUCTIONS TO THE JURY ON THE ELEMENTS OF THE CHARGED OFFENSES BUT NOT READING THOSE INSTRUCTIONS ALOUD TO THE JURY?.....	7
DID THE TRIAL COURT’S INSTRUCTIONS ON THE CHARGE OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, MCL 750.227b, FAIRLY REPRESENT THE ISSUES TO BE TRIED AND ADEQUATELY PROTECTED THE DEFENDANT’S RIGHTS?.....	12
DID THE DEFENDANT WAIVE ANY INSTRUCTIONAL ERRORS WHEN IS ATTORNEY EXPRESSED SATISFACTION WITH THE INSTRUCTIONS AS GIVEN, SEE PEOPLE V KOWALSKI, 489 MICH 488 (2011)?.....	15
WHAT STANDARD OF REVIEW SHOULD BE USED IN REVIEWING THE COURT APPEALS DECISION TO ORDER AN EVIDENTIARY HEARING ON THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM?.....	25
DID THE COURT OF APPEALS ERR UNDER THE APPLICABLE STANDARD WHEN IT ORDERED AN EVDENTIARY HEARING FOR DEFENDANT TO ESTABLISH THE FACTUAL PREDICATE FOR HIS CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE HIM OF THE POTENTIAL CONSEQUENCES OF WITHDRAWING HIS GUILTY PLEA? SEE MCR 7.211(C)(1)(a)(ii) AND PEOPLE V GINTHER, 390 MICH 436, 445 (1973).....	28
RELIEF REQUESTED.....	33
CERTIFICATE OF SERVICE.....	33

## INDEX TO AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
<i>Lafler v Cooper</i> , 132 S Ct 1376, 1384 (2012).....	28
<i>Missouri v Frye</i> , 132 S. Ct. 1399 (2012).....	28
<i>Padilla v Kentucky</i> , 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010).....	29
<i>Strickland v Washington</i> , 466 US 668; 104 S Ct 2052; 80L Ed 674 (1984).....	16, 17, 30
<i>Sullivan v Louisiana</i> , 508 US 275; 113 S Ct 2078; 124 L Ed2d 182 (1993).....	22, 24
<i>Brackett v Focus Hope, Inc</i> , 482 Mich 269, 275 (2008).....	25
<i>Estes v Titus</i> , 481 Mich 573, 578-579; 751 NW2d 493 (2008).....	25
<i>Maldonado v Ford Motor Co</i> , 476 Mich 372, 388; 719 NW2d 809 (2006).....	26
<i>People v Anderson</i> (After Remand), 446 Mich 392, 405406; 521 NW2d 538 (1994).....	22
<i>People v Babcock</i> , 469 Mich 247, 269; 648 NW2d 221 (2003).....	26
<i>People v Carbin</i> , 463 Mich 590; 623 NW2d 884 (2001).....	17
<i>People v Carines</i> , 460 Mich 750, 766; 597 NW2d 130 1999).....	15, 22
<i>People v Duncan</i> , 462 Mich 47; 610 NW2d 551 (2000).....	13, 14, 15, 22
<i>People v Gardner</i> , 482 Mich 41; 753 NW2d 78 (2008).....	10
<i>People v Ginther</i> , 390 Mich 436; 212 NW2d 922 (1973).....	2, 25, 28, 30, 31
<i>People v Hoag</i> , 460 Mich 1; 594 NW2d 57 (1999).....	17
<i>People v Kowalski</i> , 489 Mich 488, 501; 803 NW2d 200 (2011).....	2, 11, 13, 14, 15, 16
<i>People v Lambert</i> , 395 Mich 296; 235 NW2d 338 (1975).....	14
<i>People v Liggett</i> , 378 Mich 706, 714; 148 NW2d 784 (1967).....	11
<i>People v Peltola</i> , 489 Mich 174; 803 NW2d 140 (2011).....	10
<i>People v Pickens</i> , 446 Mich 298, 338, 521 NW2d 797 (1994).....	16, 17

<i>People v Sierb</i> , 456 Mich 519, 522; 581 NW2d 219 (1998).....	25
<i>People v Stanaway</i> , 446 Mich 643, 687-688, 521 NW2d 557 (1994).....	16, 23, 30
<i>People v Ward</i> , 381 Mich 624; 166 NW2d 451 (1969).....	21
<i>In re Carey</i> , 241 Mich App 222, 226; 615 NW2d 742 (2000).....	25
<i>People v Al-Shara</i> , 311 Mich App 560, 876 NW2d 826 (2015).....	10
<i>People v Clark (Paul)</i> , 274 Mich App 248, 251; 732 NW2d 605 (2007).....	25
<i>People v Cox</i> , 268 Mich App 440, 453; 709 NW2d 152 (2005).....	16
<i>People v Giovanni</i> , 217 Mich App 409; 722 NW2d 237 (2006).....	10
<i>People v William Johnson</i> , 187 Mich App 621; 468 NW2d 307 (1991).....	21
<i>People v Lanzo Constr Co</i> , 272 Mich App 470, 473 (2006).....	26
<i>People v Meconi</i> , 277 Mich App 651, 659746 NW2d 651 (2008).....	25
<i>People v Tice</i> , 220 Mich App 47; 558 NW2d 245 (1996).....	21
<i>People v Whitehead</i> , 238 Mich App 1, 9; 604 NW2d 737 (1999).....	22
<i>Shulick v Richards</i> , 273 Mich App 320, 324; 729 NW2d 533 (2006).....	26
<i>Walters v Snyder</i> , 239 Mich App 453, 456 (2000).....	26
<i>State v Norris</i> , 10 Kan App 2d 397, 401; 699 P2d 585 (1985).....	10
<i>State v Nelson</i> , 1998 SD 124; 587 NW2d 439, 444 (1998).....	9

**Statutes, Constitutions, and Court Rules**

MCL 2.513(N).....	8, 10
MCL 2.513(N)(3).....	9
MCL 750.227b.....	2, 12
M Crim JI 3.20.....	7, 12, 14, 20
CJI2d 11.34.....	12

CJI2d 11.34a.....	13, 21
CJI2d 17.9.....	21
US Const Amend. V and VI.....	21, 24
US Const, Am XIV.....	14
Mich Const.....	21
MCR 2.512 (D)(2).....	13
MCR 2.613(C).....	26
MCR 7.211(C)(1)(a)(ii).....	2, 28
Merriam-Webster’s Collegiate Dictionary (11th ed).....	9

### **INTRODUCTION**

On February 3, 2017 this Honorable Court ordered that the Clerk of the Court schedule oral argument on whether to grant Leave on the Plaintiff-Appellee's Application for Leave to Appeal. The Court further ordered the parties to file supplemental briefs addressing five specified issues.

## **ISSUE 1**

DID THE TRIAL COURT ERR BY PROVIDING WRITTEN INSTRUCTIONS TO THE JURY ON THE ELEMENTS OF THE CHARGED OFFENSES BUT NOT READING THOSE INSTRUCTIONS ALOUD TO THE JURY?

Defendant-Appellee answers “YES”

Plaintiff-Appellant answers “NO”

The Court of Appeals answered “YES”

## **LAW AND ARGUMENT**

Before addressing the issue of whether the trial court erred by providing written but no oral instructions to the jury, one must first address the issue of what written instructions were handed to the jury, if any.

Following closing arguments, the trial court read to the jury most of the routine model criminal jury instructions, but excluded M Crim JI 3.20, which provides in relevant part that “[y]ou may find the defendant guilty of all or [any one/any combination] of these crimes . . . or not guilty.”

The court then stated: “[W]hen you go to the jury room, ladies and gentlemen, you will be provided with a written copy of these instructions should you so choose. If there are instructions that I have given and others that I will give you wish [sic] copies of, they will be provided to you. You’ve already received the charges and the elements of the same”.

At the outset of the trial, the court had provided the jurors with written instructions reciting the elements of the charged offenses. In its preliminary instructions the trial court stated: “[T]o prove the charges, the prosecutor must prove beyond a reasonable doubt the following information that you have in your hand. I’d ask you take a look now at what has been passed out to you.” An official copy of these instructions is

nowhere to be found in the record. It is not included in the trial court record. The only documents remotely close to the official written jury instructions given to the jury, were two heavily folded copies of a two-page, typed document, which were attached to the Court of Appeals opinion for reference. There is no record anywhere of neither proper written nor oral instructions having been provided to the jury in Mr. Traver's case. This Court must consider this fact in deciding whether to grant leave to appeal.

In regards to the Court of Appeals' decision reversing Mr. Traver's conviction holding that jury instructions must be read aloud to the jury, the Court of Appeals made no error in ruling as it did. MCL 2.513(N) addresses jury instructions and provides in relevant part:

(1) Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written request on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but at the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

As the Court of Appeals noted the phrase "the court must instruct the jury" carries a plain, ordinary, and commonly understood meaning. Judges instruct juries by speaking to them out loud, reading jury instructions or reciting them from memory. Spoken communication of the final instructions is deeply ingrained in the history of jury trials. "Charging" a jury, a time-honored description of the instruction process, involves a judge

telling the jurors what the law is, and explaining the deliberative process. Subsection (N)(3) cements a common-sense construction of the court rules as a mandate for spoken instructions.

Subsection (N)(3) states:

Copies of Final Instructions. The court shall provide a written copy of the final jury instructions to take into the jury room for deliberation. Upon request by any juror, the court may provide additional copies as necessary. The court, in its discretion, also may provide the jury with a copy of electronically recorded instructions. Had the Supreme Court contemplated that a trial court could dispense with orally instructing the jury, MCL 2.513(N)(3) would be surplusage.

Resorting to a dictionary yields the same conclusion. The rules cited above repeat the same verb in relation to a trial court's task of imparting the law: "instruct." That word is commonly defined as "to give knowledge to: teach, train," "to provide with authoritative information or advice," or "to give someone an order or command." Merriam-Webster's Collegiate Dictionary (11th ed), p 649. While "instructions" may be in written form, by using the word "instruct" in the court rules, the Supreme Court signaled that a trial judge would orally "teach" the jury the law. Teaching almost always begins as a verbal experience. And historically, judges have taught jurors the law by speaking to them, reading instructions, and by answering their questions aloud. There are important reasons that in the English and American legal traditions, jury instructions are always spoken. "Reading a complete set of instructions after the evidence ensures that the jury hears and considers all applicable law before deliberations." *State v Nelson*, 1998 SD 124; 587 NW2d 439, 444 (1998). "Instruction of the jury is one of the most fundamental

duties of the court and it is only through their oral delivery that the court can be assured that the jury has actually received all of the instructions.” *State v Norris*, 10 Kan App 2d 397, 401; 699 P2d 585 (1985).

There is no precedent on the issue of whether jury instructions must be read aloud to the jury. It is a question of statutory interpretation. The main goal of statutory interpretation is to ascertain and give effect to the Legislature’s intent. *People v Peltola*, 489 Mich 174; 803 NW2d 140 (2011). The most reliable indicator of the Legislature’s intent is the words in the statute. (*Id.*). The words are interpreted in light of their ordinary meaning and their context within the statute and are read harmoniously to give effect to the statute as a whole. (*Id.*). If the language is unambiguous and clear, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *People v Giovanni*, 217 Mich App 409; 722 NW2d 237 (2006). A provision is not ambiguous just because reasonable minds can differ regarding the meaning of the provision. Rather, a provision of the law is ambiguous only if it irreconcilably conflicts with another provision, or when it is equally susceptible to more than a single meaning. *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008).

As described above, the words contained within MCL 2.513(N) when interpreted in light of their ordinary meaning leads to the logical conclusion that jury instructions must be read aloud.

The question of whether jury instructions must be spoken could also be likened to the rule that the trial court in accepting a misdemeanor plea from a defendant shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. See *People v Al-Shara*,

311 Mich App 560, 876 NW2d 826 (2015). Speaking directly to the intended audience ensures that everyone on the jury panel received the same instructions. It also ensures that a record is made for appellate purposes. It ensures that there is a record of a jury being instructed on all the elements of the crime, something that is conspicuously missing from the present record. It also ensures that the jury was provided with all pertinent and necessary instructions, again, something that is absent from the present record.

In the case at bar there is no way of ensuring that the jury ever received the necessary instructions. Requiring that oral instructions be given would ensure that a defendant's right to a fair trial is respected as required by the Due Process Clause of the 14<sup>th</sup> Amendment to the United States Constitution.

In conclusion, the Court of Appeals did not err in holding that the trial court's failure to verbally communicate a complete set of jury instructions constituted plain error that affected Mr. Traver's substantial "right to have a properly instructed jury pass upon the evidence." *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967). The Court of Appeals did not err in holding that the trial court's error seriously affected the integrity of the proceedings, as a defendant in a criminal case "has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). The Court of Appeals correctly held that it is impossible to determine whether the jurors who determined Mr. Traver's guilt actually received and considered the instructions addressing the elements of the charged offenses. In conclusion, the Court of Appeals correctly held that this hole in the record impugns the integrity of the proceedings, requiring reversal of both convictions.

## **ISSUE 2**

DID THE TRIAL COURT'S INSTRUCTIONS ON THE CHARGE OF POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY, MCL 750.227b, FAIRLY REPRESENT THE ISSUES TO BE TRIED AND ADEQUATELY PROTECTED THE DEFENDANT'S RIGHTS?

Defendant-Appellee answers "NO"  
Plaintiff-Appellant answers "YES"  
The Court of Appeals answered "NO"

## **LAW AND ARGUMENT**

From the available record, including the instruction that contained a jury question and which was made part of the record, it is clear that the jury was never instructed on the elements of a felony firearm as required by the model jury instruction CJI2d 11.34. The trial court also never instructed the jury that they could find Mr. Traver guilty of all some or none of the offenses charged as required by CJI2d 3.20.

Furthermore, the judge in instructing the jury, stated that should they find the defendant guilty on count one, two and/or three and if they believed that one or more of those offenses were committed with a firearm, then count four would kick in, left the jury with no choice but a guilty finding on count four of felony firearm, once they found him guilty of the felonious assault. A verbal instruction of CJI2d 11.34 was not given to the jury by the trial court at any point during trial. The written instruction that may or may not have been provided to the jury (there is no copy of the jury instructions contained in the court file). The trial court erred when it failed to instruct the jury on all the elements of all the crimes. Specifically, the trial court omitted reading the elements of the count of felonious assault and the count of felony firearm; coincidently the two counts the Defendant-

Appellee was found guilty of. This deprived the jury of an understanding of what the Prosecutor had to prove beyond a reasonable doubt before finding him guilty. As correctly stated by the Court of Appeals' majority opinion; the trial court failed to instruct orally on the two elements of the felony firearm charge. Defense counsel did not request instruction on the felony firearms elements either. By failing to provide the jury with the model instruction, the trial court violated MCR 2.512 (D)(2). Furthermore, the Court of Appeals correctly held that the trial court provided inaccurate written instructions regarding the elements of felony firearm. The partial, written instruction for the felony firearm charge that was included in the trial court file with jury notes on, stated only the model instruction for the definition of possession related to the charge, rather than the model instructions on the elements. See CJI2d 11.34a. It is, once again, unknown what else was provided to the jury. It is possible that the jury was never instructed on the actual elements of the offense of felony firearm. By failing to provide the jury with the model instruction, the trial court violated MCR 2.512(D)(2). It is painfully clear that if what was discussed on the record is what was provided to the jury, the instruction was defective. The instruction also did not fairly represent the issue to be tried and did not adequately protect Mr. Traver's rights.

As the Court of Appeals correctly held "A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense." *Kowalski, supra* at 501. Although instructional errors that misstate or omit elements of a crime do not necessarily mandate a new trial, *id.*, the absence of any instruction at all surely does. Indeed, our Supreme Court held in a substantially similar case, *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), that

the failure to instruct on the elements of felony-firearm constitutes structural error. The Court iterated a “bright line rule” that governs this case: “It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt.” *Id.* at 48.

Furthermore, the instructions given did not fairly present the issues to be tried and adequately protected the defendant’s rights, *Kowalski, supra* at 501-502. The instructions erroneously told the jurors that if they found Mr. Traver had used a gun in the commission of one of the other crimes then he would be guilty of felony firearm. The jury was not instructed that they could still find Mr. Traver not guilty of said offense. In addition, they were not given CJI2d 3.20 which states that a defendant can be found guilty of all, some or none of the charged offenses. This failure shifted the burden from the People to the Defendant, resulting in an unfair representation of the question before the jury.

Juries cannot be allowed to speculate. The trial court must inform the jury of the law by which its verdict must be controlled. *People v Lambert*, 395 Mich 296; 235 NW2d 338 (1975). Like in *Duncan, supra*, the trial court in Mr. Traver’s case failed to do so, thereby requiring automatic reversal of the Defendant’s convictions.

The instructions given, as a whole did not fairly represent the issues to be tried and did not adequately protect Mr. Traver’s rights as required by *People v Kowalski, supra* and the Court of Appeals did not err when it so ruled.

### **ISSUE 3**

DID THE DEFENDANT WAIVE ANY INSTRUCTIONAL ERRORS WHEN IS ATTORNEY EXPRESSED SATISFACTION WITH THE INSTRUCTIONS AS GIVEN, SEE PEOPLE V KOWALSKI, 489 MICH 488 (2011).

Defendant-Appellee answers “NO”  
Plaintiff-Appellant answers “YES”  
The Court of Appeals answered “NO”

### **LAW AND ARGUMENT**

The Court of Appeals correctly held that the issue was not waived by the trial attorney expressing satisfaction with the instructions as given.

An error in the instruction of the elements of a crime is an error of constitutional magnitude. *People v Carines*, 460 Mich 750, 766; 597 NW2d 130 (1999). Constitutional errors must be classified as either structural or nonstructural. *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000). “If the error is structural, reversal is automatic.” *Id.*

As held by the Court of Appeals, “A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense.” *Kowalski*, *supra* at 501. Although instructional errors that misstate or omit elements of a crime do not necessarily mandate a new trial, *id.*, the absence of any instruction at all surely does. Indeed, this Honorable Court held in a substantially similar case, *People v Duncan*, *supra*, that the failure to instruct on the elements of felony-firearm constitutes structural error. The Court iterated a “bright line rule” that governs this case: “It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury

regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt.” Id. at 48.

This Honorable Court ruling in *Kowalski*, *supra* does not signify that when structural error occurs, any appeal or reversal is barred when instructions are not objected to. Therefore, the Court of Appeals made no error when it held that where structural error is present, automatic reversal is required, even where trial counsel agreed to the instruction given.

Furthermore, a defendant does not waive a claim of ineffective assistance of counsel, when counsel failed to object or specifically agrees to the instructions as given. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688, 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338, 521 NW2d 797 (1994). Furthermore, unpreserved claims of ineffective assistance of counsel are limited to errors apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Defendant in the case at bar, argued that his counsel was ineffective for failing to object to the deficient instructions.

To successfully claim ineffective assistance of counsel, a defendant must show that his attorney performed below an objective standard of reasonableness under prevailing professional norms. This is the first prong of the test of *Strickland v*

*Washington*, 466 US 668; 104 S Ct 2052; 80L Ed 674 (1984). The Strickland test has been adopted in Michigan in , *People v Pickens*, *supra*; *People v Hoag*, 460 Mich1; 594 NW2d 57 (1999); *People v Carbin*, 463 Mich 590; 623 NW2d 884 (2001). There this Honorable Court elaborated that the defendant must overcome a “strong presumption” that his counsel’s conduct constituted reasonable trial strategy.” *Strickland* at 689.

Guidelines for determining when counsel’s performance falls below the level required to ensure a reliable result at trial were also provided in *Strickland*: “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id* at 691.

In the case at bar it is impossible that defense counsel’s performance constituted reasonable trial strategy. Trial counsel fell below constitutional standards when he did not object to/ agreed with constitutionally defective jury instructions provided to the jury by the trial court.

Prior to the commencement of testimony, the trial court instructed the jury as follows:

“[T]o prove the charges, the prosecutor must prove beyond a reasonable doubt the following information that you have in your hand. I’d ask you take a look now at what has been passed out to you.

In count one, the defendant is charged with the crime of carrying a concealed weapon. To prove this charge, the prosecutor must prove, beyond a reasonable doubt, those elements so listed. First, knowingly carried a weapon, a pistol. It does not matter whether the defendant was carrying the weapon, but to be guilty of the crime, the defendant must have known, that it was a weapon. Second, that this pistol was concealed, complete invisibility is not required. A weapon is concealed if it cannot easily be seen by those who come into ordinary contact with the defendant.

Now, as you can see in count two and count three, and count four, those are the elements, ladies and gentlemen, that you will need to pay attention to during the course of this trial. Those are the four counts that Mr. Traver is charged with, and the attorneys will be discussing all of those as we proceed through here by questions of the witnesses. Okay?”. (See 11/12/14 Tr. p. 34-35). However, it is unknown what was given to the jury as this is not part of the record. The trial court never went through all the elements which needed to be proven beyond a reasonable doubt by the People on the charges that Mr. Traver was eventually found guilty of; i.e. the count of felonious assault and the count of felony firearm.

At the conclusion of testimony the trial court stated as follows:

“[O]ne of the exhibits has been a pistol. A pistol is a firearm and a firearm includes any weapon from which a dangerous object can be shot or propelled by the use of explosive gas or air. The shape of a pistol is not important as long as it 30 inches or less in length. Also, it does not matter whether or not the pistol was loaded.

The intent with which an assault is made can be sometimes determined by whether a dangerous weapon was used. Again, a dangerous weapon is any instrument that is used in

a way likely to cause serious physical injury or death. A gun or a revolver, in this instance a pistol, is a firearm, and as such, can be considered a dangerous weapon. Gentlemen, those are the final instructions. Any issue with the instructions? Mr. Hickman?”. (11/19/14 tr. p. 196).

The following exchange then took place:

Mr. Hickman: “[I] guess yeah. Your Honor, I have a -- problem with count four. I don’t think it makes it clear that there has to be an underlying felony before count four-- they could find anybody guilty of count four.”

Mr. Spencer: “[Y]our Honor, I think that’s absolutely correct and I know I attempted to explain that to the jury, but, you know, I think Mr. Hickman’s quite accurate that you can’t have felony firearm, if there is not a conviction for a felony”.

The Court: “[C]orrect. The point that Mr. Hickman is making, ladies and gentlemen, is referenced in count four, felony firearm, possession. If, for example, you find the defendant not guilty of the other three counts, you cannot find him guilty of the felony firearm. Okay? Because no felony has been committed. Mr. --“

Mr. Spencer: “[B]ut, your Honor, I – I do want it clear, and I think Mr. Hickman would agree, that if you’re found guilty of one or two or three of the other charges, and you find it was committed with a firearm, or you were in possession of a firearm, that’s when the felony firearm kicks in.”

Mr. Hickman: “[A]bsolutely.”

The Court: “[A]bsolutely, correct. Absolutely, correct. If you do find the defendant guilty in count one, two or three and understand, in your belief, that a weapon was used to commission those crimes, then count four would be applicable. Satisfied, gentlemen?”

Mr. Hickman: “[Y]es, your Honor.

Mr. Spencer: [I] am satisfied your Honor.”

(See 11/19/14 Tr. p. 196-198).

The jury was never instructed that it could find the Defendant-Appellant guilty of all some or none of the offenses charged. Furthermore, it does not appear from the file or the transcripts that CJI2d 3.20 was included in the instructions given to the jury. (See 11/19/14 Tr. p. 187-196). This instruction reads in pertinent part:

“(1) The defendant is charged with \_\_\_\_\_ counts, that is, with the crimes of \_\_\_\_\_ and \_\_\_\_\_. These are separate crimes, and the prosecutor is charging that the defendant committed both of them. You must consider each crime separately in light of all the evidence in the case. (See Appendix B on Appeal).

(2) You may find the defendant guilty of all or [any one / any combination] of these crimes [, guilty of a less serious crime,] or not guilty”.

Several instructional errors occurred in the case at bar. First and foremost, the judge in instructing the jury that should they find the defendant guilty on count one, two and/or three and if they believed that one or more of those offenses were committed with a firearm, then count four would kick in, left the jury with no choice but a guilty finding on count four felony firearm, once they found him guilty of the felonious assault. Furthermore, it does not appear that the jury was ever instructed that they could find the not guilty on all counts, guilty of all counts or guilty of some counts as provided by CJI2d 3.20. The instruction was not given to the jury by the trial court at any point during trial. This left the jury with no choice but a guilty finding on the one count of felony firearm. The instruction was erroneous because it excluded the possible verdicts of not guilty on

the felony firearm where a guilty verdict had been rendered on one or more of the other counts.

*People v Ward*, 381 Mich 624; 166 NW2d 451 (1969). A manifest injustice occurs when a missing or erroneous instruction pertains to a basic and controlling issue in the case.

*People v William Johnson*, 187 Mich App 621; 468 NW2d 307 (1991). This is exactly what happened in the case at bar. This error alone requires reversal of the Defendant's conviction.

Second, the trial court erred when it instructed the jury that a pistol had been introduced by way of an exhibit and then further stated that a pistol is a firearm which is considered a dangerous weapon per se. Whether or not a pistol or firearm is present is a question of fact for the jury to find both on the felony firearm count and on the felonious assault count when the felonious assault, as was the case here, is alleged to have occurred because of the presence of a firearm. See both CJI2d 11.34 for the felony firearm and CJI2d 17.9 for the felonious assault. (See Appendix C on Appeal). The trial court's instructions as provided made impermissible findings of fact and conclusions of law in lieu of the jury. A constitutional violation occurred and reversal is required as this instruction took an element of the offense away from the jury. *People v Tice*, 220 Mich App 47; 558 NW2d 245 (1996); US Const Amend. V and VI, Mich Const.

Third, the trial court erred when it failed to instruct the jury on all the elements of all the crimes. Specifically, the trial court omitted reading the elements of the count of felonious assault and the count of felony firearm; coincidentally the two counts the Defendant-Appellant was found guilty of. This deprived the jury of an understanding of what the Prosecutor had to prove beyond a reasonable doubt before finding the him guilty.

An error in the instruction of the elements of a crime is an error of constitutional magnitude. *People v Carines, supra*. Constitutional errors must be classified as either structural or nonstructural. *People v Duncan, supra*. “If the error is structural, reversal is automatic.” *Id.*

Preserved constitutional errors that do not constitute structural defects do not automatically require reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405406; 521 NW2d 538 (1994). Rather, they are reviewed to determine if the error was harmless beyond a reasonable doubt. *Id.*

An instructional error regarding the “beyond a reasonable doubt” burden of the prosecutor has been held to be a structural error not subject to a harmless standard and requiring automatic reversal, *Sullivan v Louisiana* , 508 US 275; 113 S Ct 2078; 124 L Ed2d 182 (1993).

An instructional error regarding one element of a crime, whether by an incorrect description or by omission, is nonstructural and subject to a harmless error analysis, *Duncan, supra* at 51. The question before this Honorable Court on harmless error review is whether, absent the error, “honest fair-minded jurors might very well have brought in not-guilty verdicts.” *People v Whitehead*, 238 Mich App 1, 9; 604 NW2d 737 (1999).

In looking at the instructions given as a whole, the trial court clearly erred and the error requires reversal of the Defendant-Appellant’s conviction as it deprived him of the right to a fair trial. The error should be quantified as a structural error requiring automatic reversal.

Given the fact that the instructional error amounted to a structural error requiring automatic reversal, Defendant-Appellant believes he has shown that Defense counsel's failures did not meet the "reasonable trial strategy" prong of the *Strickland* test.

We now turn to the second prong of the test, which is prejudice. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, supra. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Trial counsel failed numerous times. Absent the errors by trial counsel, it is highly unlikely that the Defendant-Appellant would have been found guilty of the crimes charged.

In this case, defense counsel's conduct in failing to object or request better instructions meets all *Strickland* requirements. The errors are also apparent on the record.

The Defendant-Appellant has shown that trial counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different.

*People v Stanaway*, supra. The Defendant-Appellant has affirmatively demonstrated that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v. Pickens*, supra. The Defendant-Appellant was clearly prejudiced by the error as it resulted in his conviction of felonious assault and felony firearm.

Mr. Traver's is entitled to an automatic reversal of his conviction for structural error where the trial court gave deficient instructions regarding the burden of proof on each (any) element of the crimes he was convicted of, where the trial court failed to instruct the jury on each element of the crime, where the trial court took away an element of each

of the crimes the Defendant was found guilty of, thereby lessening the People's burden and where the trial court never instructed the jury that it could find the Defendant-Appellant not guilty of the felony firearm even if it found him guilty of one of the underlying crimes. All of these errors, by themselves and certainly combined deprived the Defendant-Appellant of his constitutional rights under US Const Amend V and VI as well as following the United States Supreme Court's ruling in *Sullivan v Louisiana*, *supra*. Therefore, no error occurred when the Court of Appeals granted Mr. Traver a new trial.

#### **ISSUE 4**

WHAT STANDARD OF REVIEW SHOULD BE USED IN REVIEWING THE COURT APPEALS DECISION TO ORDER AN EVIDENTIARY HEARING ON THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM?

Defendant-Appellee did not answer  
Plaintiff-Appellant did not answer  
The Court of Appeals did not answer

#### **LAW AND ARGUMENT**

It appears that there is no precedent as to how this Court should review the Court of Appeal's decision to remand the matter for a Ginther hearing should Mr. Traver so choose. There are several recognized standards of review acknowledged by the Courts of our great State.

Questions of law are reviewed de novo. *Brackett v Focus Hope, Inc.*, 482 Mich 269, 275 (2008); *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). Examples of questions of law include the interpretation of statutes, constitutional provisions, *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *People v Meconi*, 277 Mich App 651, 659746 NW2d 651 (2008); *In re Carey*, 241 Mich App 222, 226; 615 NW2d 742 (2000), and court rules, *Estes, supra* at 578-579; *People v Clark (Paul)*, 274 Mich App 248, 251; 732 NW2d 605 (2007). The Court of Appeals' decision to remand for a Ginther hearing does not involve the interpretation of statutes or constitutional provisions. At best it involves the Court of Appeals' interpretation of the scope of remand powers provided by the case of *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Next, a lower court's findings of fact are reviewed for clear error. MCR 2.613(C). See also *Walters v Snyder*, 239 Mich App 453, 456 (2000). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses before it." MCR 2.613(C). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Lanzo Constr Co*, 272 Mich App 470, 473 (2006). See also *Walters*, *supra* at 456. Again, in the case at bar, the Court of Appeals made no factual findings in regard to Mr. Traver's claim of ineffective assistance of counsel. To the contrary, the Court of Appeals held that there were insufficient facts on which to form an opinion.

Therefore, the logical conclusion would be for this Honorable Court to review the Court of Appeals' decision to remand the matter for a Ginther hearing for an abuse of discretion. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 648 NW2d 221 (2003). See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), which adopted the *Babcock* Court's articulation of the abuse of discretion standard as the default standard in all cases. But see *Shulick v Richards*, 273 Mich App 320, 324; 729 NW2d 533 (2006), where the Michigan Court of Appeals construed the *Maldonado* holding to mean that "a default abuse of discretion standard of review is an assumed or assigned standard of review unless the law instructs otherwise." "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Babcock*, *supra* at 269.

Wherefore, the Defendant-Appellee, Gary Traver, respectfully requests this Honorable Court employ the default abuse of discretion standard when reviewing the Court of Appeals' decision.

#### **ISSUE 4**

DID THE COURT OF APPEALS ERR UNDER THE APPLICABLE STANDARD WHEN IT ORDERED AN EVIDENTIARY HEARING FOR DEFENDANT TO ESTABLISH THE FACTUAL PREDICATE FOR HIS CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE HIM OF THE POTENTIAL CONSEQUENCES OF WITHDRAWING HIS GUILTY PLEA? SEE MCR 7.211(C)(1)(a)(ii) AND PEOPLE V GINTHER, 390 MICH 436, 445 (1973)

#### **LAW AND ARGUMENT**

Defendant-Appellee wants to make it clear that he never asked for the matter to be remanded for an evidentiary hearing pursuant to either MCR 7.211(C)(1)(a)(ii) or *People v Ginther*, 390 Mich 436 (1973). Defendant-Appellee believes that there was abundant evidence that one or more of his trial counsels were ineffective for not advising him of the potential consequences of his plea withdrawal. The record in the matter was clear and Mr. Traver established the factual predicate for his claim of ineffective assistance of counsel. Mr. Traver submitted an Affidavit in support of his claim which was also supported by the record.

The Sixth Amendment guarantee to the right to the assistance of counsel during their criminal proceedings extends to the plea-bargaining process, during which defendants are entitled to the effective assistance of competent counsel. The right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. Defense counsel has a duty to communicate plea offers to the defendant and give competent advice in regard to accepting or rejecting the offer. *Lafler v Cooper*, 132 S Ct 1376, 1384 (2012); *Missouri v Frye*, 132 S. Ct. 1399 (2012). The Court of Appeals in Mr.

Traver's case, correctly held that the same applies when counsel is advising a client on how to proceed with a plea withdrawal.

Mr. Traver successfully argued in the Court of Appeals that he should be afforded an opportunity to show that his trial counsel was ineffective in advising him prior to him withdrawing his guilty plea. The record is abundantly clear that the People were going to add a count of felony firearm should Mr. Traver withdraw his plea. For the People to argue in their application for leave to this Court that trial counsel could not be ineffective for failing to advise Mr. Traver of something that had yet to occur is disingenuous. *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010) specifically states that effective assistance of counsel includes the attorney informing his or her client of any *potential* immigration consequences. Failure to do so entitles a defendant to withdraw their plea. Likewise, counsel, prior to Mr. Traver withdrawing his plea should have informed him of the *potential* consequences of that withdrawal. They failed to do so. Moreover, the People's intent was clear, making the adding of a count of felony firearm close to a certainty; which materialized following the plea withdrawal. Much like a deportation may materialize following the entry of a plea on a criminal charge. What was also clear from the record is that Mr. Traver was never advised of this consequence. His trial counsel was ineffective for filing a motion to withdraw plea without appraising Mr. Traver that a count of felony firearm, which carried a 2 year mandatory prison sentence upon conviction, would be added to the information if he withdrew his plea.

Furthermore, the record is also deprived of any indication that Mr. Traver was present during the hearing where the People made its intent known. Because Mr. Traver lived a ways away from the court he had been allowed on numerous occasions not to

appear. The record always reflected his presence. It did not during said pretrial. It should also be noted that Mr. Traver changed attorneys between proceedings and there is no record evidence that the exiting attorney informed the entering attorney of the People's intent. Likewise Mr. Traver showed prejudice. He received a two year prison sentence as a result of trial counsel ineffective representation. But for the trial counsel's errors and ineffectiveness the Defendant-Appellant would not have been found guilty of the crimes charged, making it clear that a miscarriage of justice has occurred.

Mr. Traver absolutely showed trial counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688, 521 NW2d 557 (1994). Mr. Traver also successfully demonstrated both prongs of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80L Ed 674 (1984) and the Court of Appeals did not err in their decision and ruling.

The remand was not improper pursuant to *Ginther, supra* where Mr. Traver showed that counsel was ineffective in their representation where they did not advise Mr. Traver of the collateral consequences. The only clarification sought by the Court of Appeals, and the reason for the remand, was to ascertain whether trial counsel advised Mr. Traver. It appears clear that if Mr. Traver was not advised this constituted ineffective assistance of counsel. (See Court of Appeals Opinion).

Therefore, this Honorable Court could find both that the predicate facts were already established from the record and that Mr. Traver, prior to exercising his right to a new trial, should be re-offered the original plea deal presented to him. The Court could also find, based on the facts already established, that it was proper and not in violation of

*Ginther, supra* to remand the matter for a hearing for the sole purpose of establishing that Mr. Traver was not informed of the collateral consequences of his plea withdrawal.

**RELIEF REQUESTED**

Defendant-Appellee, Gary Michael Traver, respectfully requests that this Honorable Court deny the Plaintiff-Appellant's Application for Leave to Appeal.

Respectfully submitted,

K AND Q LAW, PC

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Dated: 03/13/2017

**CERTIFICATE OF SERVICE**

I, Cecilia Quirindongo Baunsoe, certify that on today's date, I electronically filed the foregoing paper with the Clerk of the Court using the E-Filing System and that I served the following by way of E-Service and US Mail:

Michigan Attorney General's Office  
Criminal Appellate Division  
Scott R. Shimkus (P77546)  
PO Box 30217

Dated: March 17, 2017

/s/ Cecilia Quirindongo Baunsoe  
CECILIA QUIRINDONGO BAUNSOE